

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





74-1214

to be argued by  
Roy M. Cohn

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In The  
UNITED STATES COURT OF APPEALS  
for the Second Circuit

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UNITED STATES OF AMERICA,  
Appellee,

vs.

ANCORP NATIONAL SERVICES, INC.,  
Appellant.

On Appeal from Judgment of the United States  
District Court for the Southern District  
of New York

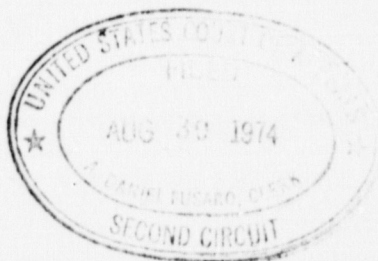
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AMENDED APPENDIX  
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United States of America

vs

Anacorp National Services

July 19, 1973 10:55 am.  
New York, New York

THE COURT: I told you when the trial was concluded last week I was going to call you sometime this week. I want to know whether you explored further the responsibility of settling the case which I don't want to settle because it is a nonjury case.

MR. HALPERN: We had a discussion with Mr. Rosenberg the very day you suggested. Mr. Roth is now taking under advisement, the question of making a proposal in writing. We were told there could be no discussions as between the two of us. Everything must be in writing.

As a matter of fact Mr. Blank verified that. Mr. Roth is now in the midst of discussions with the various parties who are involved with the defendant as to what can be done and a proposal in writing will be submitted next week. There is no question about that.

He expected to get an answer the early part of the week and then we will put that in writing.

MR. ROSENBERG: Your Honor, I am not sure.

Mr. Halpern indicated.



1 would give serious consideration to any offer. There is  
2 no offer on the table. We will make our recommendations,  
3 pass them on to the Department of Justice, and as you know  
4 since the case does involve in excess of a quarter of  
5 a million dollars in damages if a settlement is to be --

6 THE COURT: In penalties.

7 MR. ROSENBERG: Yes.

8 It is in excess of half a million but for purposes  
9 of settlement the critical figures is a quarter of a  
10 million because the addendum clause is for greater than  
11 that amount. Any settlement of that case would be approved  
12 at the level of the Attorney General for which reason I think  
13 that the settlement procedure will be extremely slow  
14 even if all of the parties here are in agreement.

15 But this remains to be seen. We also discussed  
16 the other matter that you wanted us to take up which was  
17 to agree on those portions of the four depositions that  
18 we wish to use that we will submit to you.

19 THE COURT: I have not seen them yet.

20 MR. ROSENBERG: They will be marked appropriately  
21 to indicate the pages that we both agree are relevant  
22 for your consideration.

23 MR. HALPERN: I will make whatever exceptions  
24 I have to that.  
25

1 pgrf

2 THE COURT: That's right. Sure.

3 I would like to say this to you gentlemen:

4 I heard the testimony and I have not read the  
5 depositions, obviously. But I do think that from the  
6 testimony I heard that the defendant did not follow, did  
7 not observe, this amended order of the Federal Trade  
8 Commission of April 13, 1964 because I do think that the  
9 testimony of the newspaper people, those were in the nature  
10 (from the testimony) of allowances, compensation, in  
11 consideration for display or promotional services or  
12 facilities.

13 It's true that defendant's witness thought there  
14 might have been a price allowance, but the evidence to my  
15 mind is completely to the contrary.

16 So that if this has to be decided by me,  
17 and again subject to reading these depositions which I  
18 don't think will probably change very much, I rather think  
19 that Ancorp did violate the amended order of the Federal  
20 Trade Commission.

21 I have serious problems on the assessment of  
22 penalties. The Government adopted a formula, I guess.  
23 What was your formula?

24 MR. ROSENBERG: He stated for a month that  
25 the defendants were to be fined a certain amount.

of limitations a violation was committed.

THE COURT: That's a formula. I'm not sure -- what was the total amount? Do you know the total amount of the allowance from the four newspapers?

MR. ROSENBERG: There were only three newspapers mentioned in the complaint, The Times, The News and The Post.

There are different totals depending upon which period of time you focus on, whether you limit it to the period within the statute of limitations which is the five years prior to the filing of complaint at the very end --

THE COURT: What would that amount be?

MR. ROSENBERG: Roughly \$180,000.

THE COURT: That Ancorp did receive.

MR. ROSENBERG: From the three newspapers named in the complaint and looking only to the period within the statute.

If you broaden your advice today and include all of the payments received from the time the order was affirmed by the Second Circuit and include other payments which came to light in the course of discovery, the total is considerably larger and it is set out in our trial brief at \$390,000.

THE COURT: Is there any other...



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assessment of penalties? You had a formula which you thought was a reasonable formula from the point of view of the Government. Is there any authority on this business?

MR. ROSENBERG: There is limited authority on what constitutes a violation but we would be happy to brief it extensively.

THE COURT: Don't brief it extensively. I want to know what the authorities are. It does not have to be too extensive.

Do you know any authorities on the subject?

MR. HALPERN: No. As a matter of fact I started checking that up and I'm going to follow through on it of course.

May I make one comment to your Honor's observation.

I realize that everything is tentative. I would like your Honor to reserve a definite commitment until you read our briefs. I do wish to state that our position will be basic and we will start off with, number one, the question of mitigation of damages which goes to the very heart of the question that your Honor just posed.

The second, of course, will be the question as to whether or not there was a real intended violation or one that we could say is a technical violation, all of which will be briefed and I don't think should be discussed.

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1 THE COURT: I heard Mr. McCollough's  
2 testimony and I think he was quite candid when he said he  
3 was looking for more profit. He was not getting enough  
4 out of this and he was looking for more profit and in his  
5 desire to look for more profit I don't think there is  
6 much doubt he went into this arrangement and I do think  
7 these arrangements violated the order of the FTC.

8 That seems to be pretty clear.

9 MR. [unclear]: On the basis of the wording used,  
10 on the basis of the bills that were submitted, yes. But  
11 we merely claim that all of this was camouflage for the  
12 real purpose.

13 However, I will be able to present that more fully  
14 in a brief and I would like to keep your Honor's mind open  
15 on that, that there is no question about it. If we are  
16 going to ask, was there a violation with filing an  
17 advertising bill of this sort, of course there was.

18 But the question was, was it a real advertising  
19 allowance or was it a payment on a price rebate which was  
20 historically paid to them for very good and sufficient  
21 reasons and I think we will be able to establish your  
22 to your Honor's satisfaction in our memorandum that this  
23 was helpful to The Times, to the public, and to the  
24 Government itself.



1 per 7

2 THE COURT: Of course--

3 MR. HALPERN: That will go to mitigation.

4 THE COURT: I'm limited as to what the testimony  
5 of Mr. McCollough was on this.

6 MR. HALPERN: I'm going -- the testimony for  
7 example by Mr. Wallerstein, the testimony of the newspapermen  
8 themselves, I'm talking now of the testimony that your  
9 Honor heard and the depositions of the newspapers, in other  
10 words, I'm going to rely much more on them than anything  
11 that Mr. McCollough said.

12 The only thing I'm concerned with with our  
13 testimony is the statement of Mr. Mineo as to the difference  
14 in income after 1969 when these price allowances are  
15 advertising allowances were discontinued by the newspapers.  
16 Ancorp, the defendant, was much better off from a  
17 financial condition and would have been if it had followed  
18 the same practice throughout the years and that would have  
19 been harmful to the newspapers, to the reading public,  
20 and also to advertisers.

21 So that as far as we can see, we are talking  
22 now of the effect and the purpose of this statute. Did  
23 it hurt either the public or the publishers or the  
24 defendant or the Government or anyone else? And our con-  
25 tention will be that it did not hurt Mr. McCollough

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2 said but that the newspapers themselves said was the pur-  
3 pose of this, that that was for the benefit of all parties  
4 concerned.

5 Again, I am conceding that I will urge far more  
6 strongly from a logical standpoint this is in mitigation  
7 rather than in complete exoneration.

8 THE COURT: I understand that.

9 MR. HALPERN: Not that I'm giving up the idea  
10 there could be exoneration. I want to reserve that, of  
11 course. I'm making no concession of liability here.

12 THE COURT: I have a very simple promise that  
13 Mr. McCollough, he testified he knew about the order  
14 all right, but he didn't pay much attention to it. I'm  
15 sure he didn't. He may have in the best of faith been  
16 anxious to increase the profit. He said that's what he  
17 wanted to do really but what he did in doing it seemed to  
18 me to be entirely contrary to the Federal Trade  
19 Commission's order.

20 MR. HALPERN: May I point one thing out. Number  
21 one, he stated that he thought that order applied only  
22 to magazines.

23 THE COURT: There is no justification for  
24 that.

25 MR. HALPERN: That may be.

THE COURT: The order speaks of products.

MR. HALPERN: I understand that. I'm not discussing that. But I want to point out that these arrangements were made in '60 and '61, long before the order came down.

THE COURT: I think -- I don't think anybody has to go to too much extensive memoranda but I would like a memoranda on this subject of penalties.

MR. ROSENBERG: We will brief that point.

In the interim --

THE COURT: I think I remember your brief. You took it. It was an arbitrary formula. You picked every day or every month.

Brief what you think the penalty should be in the event of liability and what authorities there are that might help me reach a decision on that.

MR. ROSENBERG: The most recent precedent as far as we are concerned is Judge Motley's decision in U. S. against J. B. Williams Company earlier this year in which she --

THE COURT: That's shaving soap?

MR. ROSENBERG: Ceritol advertisement.

That she held that each broadcast of prohibited advertisement constituted a separate



violation of the FTC order and that's a latest and most thorough discussion of that issue.

MR. HALPERN: I like Old Man Gilbert's statement. Punishment should always fit the crime.

MR. ROSENBERG: We concur on that entirely.

THE COURT: There is one point here which does occur to me. I gather that Ancorp is in Chapter 11, I believe, and hopefully in the process of trying to be reorganized.

I think one thought that does occur to me that whatever penalties are covered on one of these things doesn't come out of the pockets of the offender but comes out of the pockets of the creditors and stockholders of Ancorp, I suppose.

MR. ROSENBERG: May I speak to that briefly.

If a judgment is taken against Ancorp it will be in the nature of a penalty judgment and under the Bankruptcy Act such a judgment is not dischargeable and for that reason it need not be taken out of Ancorp prior to or at the time of the arrangement with the creditors. It will service any such arrangements.

The Government does not take the view it must satisfy its claim --

THE COURT: ...

arrangements? Does it become a liability of reorganized company?

MR. ROSENBERG: Yes, sir.

THE COURT: It might be a little hard to get some fellows to come in and put up money to reorganize Ancorp if they knew that the money they were putting up was going to go to pay penalties under the FTC proceeding.

MR. ROSENBERG: I concede that would make the company less attractive investment to others, but I would add, your Honor, that this is a company that at least during its halcyon days was grossing 150 to 170 million a year.

THE COURT: So were the railroads.

MR. ROSENBERG: Most of its divisions are still profitable.

THE COURT: I don't know anything about that. I did have the feeling as I listened to all that testimony that something had happened to the Union News that happened to the railroad. They were all riding high, wide and handsome and the railroad business went to pot and they probably went to put too to a certain extent.

Is that true?

MR. HALPERN: I think that you have a problem there. I think labor is one of the things.

productive as it used to be. I noticed in our office for example we don't get nearly as much work out of our associates as we did ten, 15 years ago. And we are paying out substantially more.

I'm reasonably certain that that is true of most businesses. I think that's one of the reasons we are having the inflation we are having today.

THE COURT: Perhaps we have become more civilized. You don't have as many sweat shops as you used to.

MR. HALPERN: That's an advantage.

THE COURT: Except being a federal judge. That's the only sweat shop around here.

MR. HALPERN: You have no eight hour day.

THE COURT: No, sir.

MR. HALPERN: Neither do I.

MR. ROSENBERG: Your Honor, the mind boggles at some of those suggestions but I would add that -- that Mr. McCollough's last testimony was clear that he didn't know whether the Union News' position had suffered, financially and the defendant has yet to come forward with any statement to indicate that the responsible company in this proceeding has suffered at all during these years. Ancorp National Service is a conglomerate which owned a number of businesses that turned sour in the



2                    Those leases and contracts have been terminated.  
3      Now, during the period of reorganization the company will  
4      retrench back to its former more profitable position.

5      I think we should await that picture before assuming that  
6      this company is in a position analogous to the railroads.

7                    THE COURT: That could be. I listened to the  
8      evidence. I don't know about the ramifications of Ancorp.

9                    Brief this question of penalties on both sides.  
10     Then send the depositions in and pursue your settlement  
11     negotiations. I think that's the thing to do. I want  
12     to indicate to you my present positions, I think it is  
13     a question of penalties. So I would like to see what you  
14     all have to say on that.

15                   MR. HALPERN: May I ask one other question?

16                   I called Mr. Quinones for the record and he  
17     suggested that I send a check of the \$100. I spoke to  
18     Mr. Rosenberg and Mr. Rosenbake thought that it was the  
19     policy actions of this sort that the Government orders  
20     and pays for the record. I would like to know which is so.

21                   THE COURT: I don't know. I would not see why.  
22     This is a civil suit. Do you know any answer to that?

23                   MR. ROSENBERG: I don't know. I thought, and  
24     I may well be mistaken, perhaps the Court reporter can  
25     enlighten that the suit still is a civil suit.

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the cost and if it is awarded cost recoups from the defendant. I could be mistaken.

THE COURT: So many of these cases where nobody orders the record. It does not come up. I take it what you do if somebody orders the record that I pay for it. Therefore, if you ordered the record I think that as far as the reporter is concerned he's looking for payment.

It seems to me in connection with this case what probably should be done I think is pay the \$600. I don't think you can expect the Government to do this.

MR. HALPERN: I have already authorized the check. I feel that I would not be doing justice to Ancorp if I didn't have a record to go through and pinpoint the points that I would like your Honor to consider.

THE COURT: You are right. That's much better for the judge if he has a record and he has the findings checked to the record and he can check the record.

MR. HALPERN: This is what so and so of The News said which supports our position and this is what so and so of The Times said that supports our position.

THE COURT: You are right.

MR. ROSENBERG: Your Honor, the trial has actually not come to a close. Perhaps we should put on the record now before --



MR. HALPERN: I thought we rested subject to reopening.

THE COURT: I said I would treat both parties the same way and if either side wanted to reopen I would consider their reasons for reopening. If I thought they were valid I would reopen. At the present time the trial is closed subject to that condition. I think that's what I said.

MR. HALPERN: And introduction of depositions.

THE COURT: Of the depositions. I'm asking you today to brief for me the matter of damages.

MR. ROSENBERG: Your Honor, that's agreeable with the Government. We don't propose to call any further witnesses beyond those we have called or introduce any further evidence. May we ask for a briefing schedule.

THE COURT: How long would it take to get me these briefs?

MR. ROSENBERG: I think we should have a couple of weeks after the record arrives.

THE COURT: That has not arrived.

MR. ROSENBERG: Mr. Quinones told me he thought it would be about four weeks for the transcript which would take us to mid-August. I should think --

THE COURT: Why don't we do this. Get in

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2 your briefs -- you don't need the record to write the  
3 briefs. Get me the briefs by September 1st. Inside  
4 of five days after that if they want to answer the other's  
5 brief, put in your briefs separately and serve it on the  
6 other side.

7 Give the other side five days. If they want to  
8 do anything about answering the brief. Is that reasonable?

9 MR. ROSENBERG: Thank you, your Honor.

10 THE COURT: I think that's fair enough. I would  
11 rather get your ideas as to what the penalties ought to  
12 be and then if you want to put anything in in opposition  
13 to the other side, I'll give you five days to do that.

14 MR. HALPERN: I thought if possible I might spend  
15 some time next week and if your Honor wants I could send  
16 it in the form of a letter without incorporating --

17 THE COURT: You are free to do anything you want.  
18 I'm setting outside limits.

19 MR. HALPERN: That will speed up the process.

20 THE COURT: Sure, sure. That's right.

21 MR. HALPERN: The only thing I thought was it  
22 would be rather difficult for me to present my arguments  
23 without having the record to pinpoint --

24 THE COURT: I will leave it entirely up to you.  
25 That's why I'm giving you until September 1st.



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2 MR. ROSENBERG: Your Honor, do you want us  
3 to submit in addition to the briefs, proposed findings of  
4 facts and conclusions of law?

5 MR. HALPERN: I think we could waive that in  
6 this case because we would have to have such a long list.

7 THE COURT: I would like you to do this:

8 I would like you to suggest findings of fact  
9 as to which you consider the specific violations of the  
10 order petitioned to the record and make them very brief  
11 and serve a copy on the other side. I think that's  
12 really all that I need on that. I think that would be quite  
13 a simple thing to do. I think that would be helpful to  
14 me if you did that. Anything else we can do?

15 MR. HALPERN: I think we should introduce the  
16 various depositions.

17 THE COURT: I will follow through on that. When  
18 you get them marked up I will review them.

19 (Out of the robing room.)

20 (11:20 a.m. )

21 MR. HALPERN: I was just wondering whether  
22 we could state on the record what we are going to submit  
23 in evidence and I have my objections to what the Government  
24 has done and I would like to get it on the record, my  
25 objections.

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2 THE COURT: Does this relate to the depositions?

3 MR. HALPERN: Just the depositions.

4 THE COURT: What do you have to say?

5 MR. HALPERN: I have a list that was presented  
6 to me of pages that Mr. Rosenberg asked that be introduced  
7 into evidence on the deposition of Roy I Newborn whose  
8 testimony was taken by the plaintiff and was held June  
9 7, 1973.

10 My objection to the introduction of this testimony  
11 is that it relates solely to the activities of Mr. Newborn  
12 as a representative or circulation representative of the  
13 Herald Tribune.

14 The Herald Tribune is not in this case. It  
15 is not in the complaint. It has not been mentioned and  
16 in addition to that the Court will notice that there is  
17 no documentary evidence and Mr. Newborn's testimony as to  
18 what happened was rather hazy because it is many years  
19 ago. We have no record -- I'm talking of Ancorp. of there  
20 having been any payments made from -- we could find  
21 none.

22 THE COURT: The transaction is not before me.  
23 I suppose the most this deposition could relate to  
24 would be knowledge and intent.

25 MR. ROSENBERG: We introduced Mr. Newborn's



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2 deposition for three reasons:

3 First because it does appear on the state of mind  
4 of the corporate officials of Ancorp specifically Mr.  
5 Garfinkel at a time when the FTC order was in effect.

6 Second, because it appears on the amount of  
7 compensation received by the Union News Company in violation  
8 of this order.

9 It gives some idea of the order of magnitude of their  
10 profiting under this order. And finally it should be noted  
11 that we put in the pretrial order in March of this year the  
12 fact that we were going to introduce evidence with respect  
13 to the activities of certain defunct papers specifically  
14 mentioning the Herald Tribune.

15 The defendant has been on notice for four months  
16 that this was our proposed proof at trial. There has been  
17 no objection until this very day.

18 THE COURT: I'll consider those points.

19 MR. HALPERN: Your Honor will be able to see  
20 that the weight of the evidence there is solely that it  
21 can be disregarded.

22 Am I to read in what I want to add to the Reynolds'  
23 testimony? I think as far as I am concerned what I have  
24 omitted, I have asked Mr. Rosenberg, he has omitted certain  
25 pages. I have suggested the addition of further pages.

1 pgrf 20.

2 The number of pages that I have omitted and he has omitted  
3 are so small we might just as well put the whole thing  
4 in. It would be easier for your Honor.

5 THE COURT: I would rather save myself reading  
6 long-winded depositions. I like to read the partes that people  
7 want me to read. Obviously if you mark all the pages in  
8 red or green pencil I have to read it anyway. I am  
9 inclined to agree with that. I'm trying to spare myself.

10 MR. HALPERN: I know. But the pages that he asked  
11 to be omitted are pages that I want to go in with the  
12 exception of two or three so it doesn't really matter,  
13 you see, from my standpoint.

14 THE COURT: If that's the case --

15 MR. HALPERN: I am talking about all of the  
16 omissions, they are so small, there are ten or 15 pages  
17 omitted, less than that.

18 THE COURT: If that's the case I suppose you might  
19 as well mark those pages and let me know that I have to  
20 read the whole deposition. I will read it. That's the  
21 only answer. What I do in these cases and do it successfully  
22 in admiralty actions particularly where they have these  
23 long-winded depositions taken in Timbuktu. I usually find  
24 when the lawyers get through with it I have to read three  
25 pages out of 150 page deposition. That's a useful method.



1  
2 That whas what I was hoping for.

3 MR. HALPERN: Actually -- may I speak off the  
4 record?

5 (Discussion off the record.)

6 THE COURT: Trial concluded, decision reserved.

7 (Adjourned 11:30 a.m.)  
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RECEIVED  
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UNITED STATES ATTORNEY

8/31/74



